

ORIGINAL

IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT OF	:	
AMERICA d/b/a PATASKALA OAKS	:	
CARE CENTER,	:	
	:	
Appellant,	:	On Appeal from the Licking
	:	County Court of Appeals
vs.	:	Fifth Appellate District
	:	Case No. 08CA0030
	:	
OHIO CIVIL RIGHTS COMMISSION,	:	
	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT, NURSING CARE MANAGEMENT OF AMERICA, INC., d/b/a PATASKALA OAKS CARE CENTER

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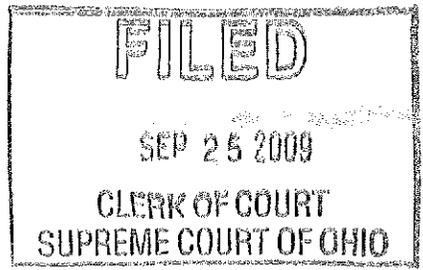


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I. STATEMENT OF FACTS

Tiffany McFee filed a charge with Appellee Ohio Civil Rights Commission (“OCRC” or “Commission”) and alleged that her employment was terminated in violation of R.C. 4112.02’s prohibition against pregnancy discrimination. (Appx. p. 45.) The OCRC found probable cause that Appellant, Nursing Care Management of America d/b/a Pataskala Oaks Care Center (“Pataskala Oaks”), violated R.C. Chapter 4112. (Appx. p. 45.) After conciliation failed, the OCRC issued an administrative complaint. (Appx. p. 45.)

In lieu of the hearing, the parties submitted Joint Stipulations of Fact. (Appx. p. 44.) The parties stipulated that, at the time of McFee’s hire, Pataskala Oaks had a leave policy that permitted up to twelve weeks of leave for those employees that had been employed by Pataskala Oaks for a minimum of one year, and that Pataskala Oaks has applied this policy consistently to all employees. (Appx. p. 46.) McFee requested maternity leave before she had worked for Pataskala Oaks for one year; her employment was terminated because she did not qualify for leave under Pataskala Oaks’ policy. (Appx. p. 47.) Approximately four weeks after the birth of her child, Pataskala Oaks’ Director of Nursing contacted McFee and left a telephone message for her informing her that a full-time day shift position at Pataskala Oaks was available and instructed McFee to contact her if interested. (Appx. p. 6.) McFee never returned the call. (Appx. p. 6.)

Upon these facts, the Administrative Law Judge (“ALJ”) found that the OCRC failed to establish a *prima facie* case of pregnancy discrimination and recommended that the OCRC dismiss the complaint. (Appx. p. 53.) The OCRC disapproved the ALJ’s Report and Recommendation and found that Pataskala Oaks discriminated against McFee in violation of R.C. Chapter 4112. (Appx. p. 30.)

Pataskala Oaks petitioned for review before the Licking County Court of Common Pleas. (Appx. p. 20.) In its appeal, Pataskala Oaks asserted two assignments of error: (1) the Ohio Civil Rights Commission did not apply the correct legal analysis, and (2) the Final Order is contrary to the Ohio Civil Rights Commission's own rules. *Nursing Care Mgt. of Am., Inc. d/b/a Pataskala Oaks Care Ctr. v. Ohio Civ. Rights Comm.* (Feb. 11, 2008), Licking C.P. No. 07-cv-00488, at 2 (Appx. p. 21.) The Common Pleas Court found both assignments of error to be well-taken, reversed the decision of Commission, and dismissed the complaint. (Appx. p. 27.)

In its discussion of the first assignment of error, the Common Pleas Court applied the legal analysis utilized in *Hollingsworth v. Time Warner Cable* (1st Dist. 2004), 157 Ohio App.3d 539, 549-550, 2004 Ohio 3130. (Appx. p. 22.) The Common Pleas Court found that Pataskala Oaks applied its leave policy consistently to all employees and that McFee was terminated because she did not qualify for leave. (Appx. p. 22-23.) Accordingly, it determined that McFee failed to make a *prima facie* case of pregnancy discrimination. (Appx. p. 23.) Further, the Court found that even if McFee made a *prima facie* case of pregnancy discrimination, Pataskala Oaks had a legitimate nondiscriminatory reason for her termination -- its consistently applied leave policy -- and "there were no allegations that adherence to the policy was a pretext for discrimination." (Appx. p. 23.)

In deciding the second assignment of error, the Common Pleas Court addressed the Ohio Administrative Code regulations on pregnancy discrimination. (Appx. p. 24-26.) The lower court found that O.A.C. 4112-5-05(G)(6) was inapplicable, because Pataskala Oaks had a leave policy.¹ (Appx. p. 25.) The lower court examined two other provisions of O.A.C. 4112-5-05,

¹ O.A.C. 4112-5-05(G)(6) provides, in pertinent part, "Notwithstanding sections (G)(1) and (5) of this rule, if the employer has no leave policy, childbearing must be considered by the (cont.)

sections (G)(4) and (G)(5), and found that they “clearly contemplate applicable leave policies, including policies that contain minimum length of service requirements for leave time.” (Appx. p. 26.)

The lower court also examined O.A.C. 4112-5-05(G)(2), which states that “[w]here termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.” (Appx. p. 26.) The Common Pleas Court concluded that “O.A.C. § 4112-5-05(G)(2), read in light of the other provisions of section (G), does not require [Pataskala Oaks] to provide pregnancy leave to an employee who has not met the minimum length of service requirement.” (Appx. p. 26.) Therefore, the Common Pleas Court found that Pataskala Oaks’ policy was consistent with Chapter 4112 and O.A.C. 4112-5-05(G), reversed the Ohio Civil Rights Commission’s decision, and dismissed the complaint. (Appx. p. 27.)

The OCRC appealed the dismissal of its complaint to the Fifth Appellate District Court. (Appx. p. 5.) In its appeal, the OCRC raised two assignments of error: (1) “The Court of Common Pleas erred in holding that the termination of a pregnant employee solely due to her need for maternity leave is not a termination ‘because of pregnancy’” and (2) “The Court of Common Pleas erred when it applied the McDonnell Douglas prima facie burden-shifting analysis in a case involving an employer’s failure to satisfy its affirmative duty to provide

employer to be a justification of a leave of absence for a female employee for a reasonable period of time.” The OCRC contended that because employees who were employed for less than one year were not entitled to leave, that Pataskala Oaks did not have a leave policy for those employees.

maternity leave for a reasonable period of time.” *Nursing Care Mgt. of Am. v. Ohio Civ. Rights Comm.* (5th Dist. Mar. 11, 2009), 2009 Ohio 1107, ¶¶ 13, 14. (Appx. p. 7.)

The Court of Appeals found the OCRC’s Assignments of Errors to be well-taken. (Appx. p. 19.) Therefore, it held that McFee’s termination constituted unlawful sex discrimination, and that Pataskala Oaks’ nondiscriminatory motive was irrelevant in light of Ohio’s requirement for maternity leave for a reasonable period of time. (Appx. p. 18-19.) The Fifth District Court of Appeals found that McFee had submitted direct evidence of pregnancy discrimination and that her claim was not subject to the familiar burden-shifting framework established in *McDonnell Douglas*. (Appx. p. 19.) The Fifth District reversed the decision of the Court of Common Pleas and affirmed the final order of the Commission. (Appx. p. 19.)

Pataskala Oaks filed its notice of appeal to the Supreme Court of Ohio on April 24, 2009 (Appx. p. 1-2.) On July 29, 2009, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1. Ohio Revised Code Chapter 4112 is an anti-discrimination statute and cannot be interpreted as a mandatory leave statute.

R.C. Chapter 4112 prohibits *discrimination* on the basis of pregnancy. The Fifth District Court of Appeals, however, held that the regulations adopted to interpret the non-discrimination statute require a mandatory leave of absence. Because R.C. Chapter 4112 is silent as to the issue of mandatory maternity leave, the regulations, as interpreted by the Court of Appeals, impermissibly expand the obligations of Ohio employers well beyond their obligation to refrain from discrimination as set forth in the statute. Therefore, the decision of the Court below must be reversed.

Specifically, R.C. 4112.02 provides that “[i]t shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * sex * * * of any person, to discharge without cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.” R.C. 4112.01(B) provides that “[w]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, * * *” (Emphasis added.) Therefore, it is clear that Chapter 4112 prohibits discrimination on the basis of sex and mandates that pregnant women shall be treated the same as non-pregnant employees for purposes of pay and fringe benefits. Chapter 4112 prohibits discrimination on the basis of pregnancy; it does not address the issue of maternity leave.

In its opinion, the Fifth District noted that R.C. 4112.02 is similar to the federal Pregnancy Discrimination Act (“PDA”) and that the Ohio Supreme Court has held that federal case law interpreting Title VII is applicable to alleged violations of R.C. Chapter 4112. (Appx. p. 11.) Indeed, courts applying Ohio’s pregnancy discrimination law routinely recognize that the Ohio statute is modeled after the PDA, the requirements of the pregnancy discrimination provisions of R.C. Chapter 4112 coincide with the PDA, and caselaw interpreting Title VII is generally applicable to cases involving R.C. Chapter 4112. See, e.g., *Priest v. TFH-EB, Inc.* (10th Dist. 1998), 127 Ohio App.3d 159, 164, 711 N.E.2d 1070 (“Federal case law is especially relevant here since R.C. § 4112.01(B) reads almost verbatim to the Pregnancy Discrimination Act ...”); *Birchard v. Marc Glassman, Inc.* (July 31, 2003), 8th Dist. No. 82429, 2003-Ohio-

4073, ¶12 (“The requirements of R.C. 4112.02 and R.C. 4112.01(B) coincide with the federal Pregnancy Discrimination Act ...”).

Despite this recognition, however, the Court of Appeals’ decision interprets the Ohio law in a manner that is clearly inconsistent with the PDA. Although cases uniformly hold that the PDA does not require preferential treatment for pregnant employees (see, e.g., *Priest v. TFH-EB, Inc.* (10th Dist. 1998), 127 Ohio App.3d 159, 165, 711 N.E.2d 1070 (citing *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App.3d 610, 617 N.E.2d 774 and *Frazier v. The Practice Management Resource Group, Inc.* (June 27, 1995), 10th Dist. No. 95APE01-46, 1995 Ohio App. LEXIS 2750); *Tysinger v. Police Dept. of City of Zanesville* (C.A.6 2006), 463 F.3d 569; *Mullet v. Wayne-Dalton Corp.* (N.D. Ohio 2004), 338 F.Supp.2d 806), the Appellate Court’s decision establishes the proposition that R.C. Chapter 4112 requires preferential treatment of pregnant employees if the pregnant employee does not qualify for leave under the employer’s neutral, uniformly applied length of service requirement for leave. Thus, the decision is contrary to established precedent, as well as the express language of R.C. Chapter 4112 and its administrative regulations. R.C. Chapter 4112 does not reflect a legislative intention to treat pregnant employees more favorably than other employees who are temporarily disabled in their ability to work. Ohio’s anti-discrimination law was never intended to create special privileges of employment reserved solely for pregnant employees.

The Fifth District found O.A.C. 4112-5-05(G) to be “unambiguous.” (Appx. p. 16.) Further, the Fifth District found that O.A.C. 4112-5-05(G)(2), and only (G)(2), applied to the facts of this case. In so holding, the Fifth District’s opinion clearly misconstrued the two relevant administrative regulations. O.A.C. 4112-5-05(G)(2) provides:

Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical

condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.

O.A.C. 4112-5-05(G)(5) provides:

Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. *When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally-applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing.* Conditions applicable to her leave, other than its length, and her return to employment shall be in accordance with the employer's leave policy.

(Emphasis added.) Clearly, (G)(5) contemplates that the employer has the right to impose conditions on an employee's ability to qualify for maternity leave, including minimum length of service requirements. The decision of the Fifth District Court of Appeals misconstrues Chapter 4112 and its administrative regulations to require all Ohio employers, regardless of size and regardless of the provisions of their leave policies, to provide maternity leave to all employees regardless of their length of employment and regardless of whether they otherwise qualify for leave.

Under the Fifth District's erroneous interpretation of O.A.C. 4112-5-05 -- that Ohio law mandates maternity leave for all pregnant employees -- the regulations clearly expand the scope of R.C. Chapter 4112 and therefore are rendered invalid. *Kelly v. Accountancy Bd.* (10th Dist. 1993), 88 Ohio App.3d 453, 457, 624 N.E.2d 1018 ("since administrative rules are made pursuant to a statutory delegation of authority, a rule which conflicts with a statute is invalid"); see also, O.A.C. 4112-5-01 (stating that the purpose of the implementing regulations "is to assure compliance with the provisions of Chapter 4112 of the Revised Code" and that "[s]uch rules

* * * are not intended to either expand or contract the coverage of Chapter 4112 of the Revised Code”). The Fifth District’s interpretation is in direct contravention of the express statement in R.C. 4112.01(B) that pregnant women “shall be treated *the same* for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work.” (Emphasis added). The Fifth District held that R.C. 4112.01(B) requires *preferential* treatment of pregnant employees by mandating that they be granted maternity leave regardless of eligibility, while other employees who are temporarily disabled from working but ineligible for leave would not be required to be given the same treatment. The Fifth District’s interpretation of O.A.C. 4112-5-05(G) expands the coverage of Chapter 4112 to mandate pregnancy leave for all pregnant employees and removes all discretion from Ohio employers to determine what requirements or limitations they can include in their maternity leave policies.

The provisions of O.A.C. 4112-5-05 cannot transform Chapter 4112, an anti-discrimination law, into a mandatory leave law. The enactment of a mandatory leave law falls within the exclusive jurisdiction of the legislature, not the Ohio Civil Rights Commission. *Weber v. Bd. of Health* (1947), 148 Ohio St. 389, 395-396, 74 N.E.2d 331 (“Under our Constitution the law-making function is assigned exclusively to the General Assembly, and it is a cardinal principle of representative government that the law-making body cannot delegate the power to make laws to any other authority or body”). See also *State ex. rel. Ashcraft v. Indus. Comm. of Ohio* (1984), 15 Ohio St.3d 126, 128, 472 N.E.2d 1077 (“[p]ursuant to Section 1, Article II of the Ohio Constitution, the power to enact laws is vested with the General Assembly”). With respect to regulations promulgated by administrative agencies such as the Ohio Civil Rights Commission, the Court has held that:

Administrative rules are designed to accomplish the ends sought by the legislation enacted by the General Assembly. Therefore,

rules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter. The commission is authorized to adopt rules to implement the provisions of R.C. Chapter 4112. However, an administrative rule may not add or subtract from a legislative enactment. If it does, the rule clearly conflicts with the statute, and the rule is invalid.

State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm. (Mar. 26, 2008), 117 Ohio St.3d 441, 445, 2008-Ohio-1261, 884 N.E.2d 589 (citations and quotation omitted).

In *State ex rel. American Legion Post 25*, the Supreme Court held that an administrative rule promulgated by the Ohio Civil Rights Commission, O.A.C. 4112-3-13(B), improperly added to Chapter 4112 by requiring a party to wait for a formal complaint to be issued before requesting a subpoena. *Id.* The Court found that Chapter 4112 expressly allowed for subpoenas to be issued on behalf of a party “to the same extent and subject to the same limitations” as those issued on behalf of the Ohio Civil Rights Commission. *Id.* The Court found that the regulation required an extra step that conflicts with the statute and therefore, the regulation was invalid. *Id.*

Likewise, here O.A.C. 4112-5-05, if interpreted as urged by the Commission and held by the Fifth District Court of Appeals below, improperly expands Chapter 4112 and is invalid. Chapter 4112 prohibits discrimination on the basis of sex, per R.C. 4112.02, and requires that pregnant women “shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, * * *” R.C. 4112.01(B). Chapter 4112 does not affirmatively require leave for pregnant employees; rather, Chapter 4112 expressly requires the same treatment of pregnant women and other employees who are not pregnant but similar in their ability or inability to work. The interpretation of O.A.C. 4112-5-05 as mandating leave for pregnant employees, without regard to the employer’s nondiscriminatory length of service requirements

applied to pregnant and non-pregnant employees alike, conflicts with Chapter 4112 and is invalid.²

Proposition of Law No. 2. An Ohio employer may legally establish a neutral leave of absence policy that requires all employees to meet a minimum length of service requirement in order to qualify for leave, including maternity leave.

The Fifth District found that Pataskala Oaks *per se* discriminated against McFee based on her pregnancy when it terminated her employment because she did not qualify for leave under Pataskala Oaks' leave policy. Such a holding conflicts with the language of O.A.C. 4112-5-05, which expressly permits an employer to require employees to satisfy a length of service requirement before being eligible for leave. Under a plain reading of O.A.C. 4112-5-05(G)(5), an employer may establish a neutral leave of absence policy that contains a length of service requirement: "*When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time.*" (Emphasis added.) The regulation then provides an illustration: "*For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing.*" (Emphasis added). By its plain language, O.A.C. 4112-5-05(G)(5) expressly authorizes Ohio employers to apply length of service requirements to maternity leave requests.

In its decision, the Fifth District refused to acknowledge the existence of Pataskala Oaks' maternity leave policy, which provides for twelve weeks of maternity leave after a year of

² Furthermore, by urging the Courts to adopt its interpretation of O.A.C. 4112-5-05, the Commission is attempting to circumvent the legislative process. As argued in Pataskala Oaks' brief to the Fifth District, in 2007, the Joint Committee on Agency Rule Review, comprised of legislators, voted down a rule proposed by the Commission that would have eliminated the regulation's language permitting minimum length of service requirements.

service. Instead, the Fifth District held that Pataskala Oaks' policy is an employment policy under which *no* leave is available, because no leave is available during the first year of employment. Because the Fifth District found no leave was available under the policy, the Fifth District concluded that the provisions of O.A.C. 4112-5-05(G)(2) control. With this tortured interpretation of the regulations, the Fifth District held that termination of an employee who requested maternity leave during her first year of employment constituted pregnancy discrimination *per se*.

By concluding that only O.A.C. 4112-5-05(G)(2) applies in this situation, the Court of Appeals rendered the provisions of O.A.C. 4112-5-05(G)(5) meaningless. "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.'" *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 256, 2002-Ohio-4172, 773 N.E.2d 536 (*quoting Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875). Further, "[s]tatutory language 'must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.'" *Id.* (*quoting State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 372-373, 116 N.E. 516); *see also McCoy v. McCoy* (4th Dist. 1995), 105 Ohio App.3d 651, 657, 664 N.E.2d 1012. Ohio Revised Code Section 1.51 states that

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. § 1.51 (2009). Such rules of statutory construction apply likewise to regulations. *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 36, 567 N.E.2d 1018 (applying the statutory rule of construction contained in R.C. § 1.51 to Administrative Code provisions). The Court of Appeals' interpretation of O.A.C. 4112-5-05 renders section (G)(5) meaningless and inoperative; therefore, its interpretation of the regulation violates this fundamental rule of statutory construction.

Had the Court simply construed the regulatory provisions as a whole, a different result would have been mandated. The two provisions co-exist harmoniously if the provisions of O.A.C. 4112-5-05(G)(2) apply only in situations where the employer has *no* maternity leave policy, or in situations when the policy is *insufficient in length*. Insufficiency cannot be determined because of a length of service requirement -- indeed, per the last sentence of 4112-5-05(G)(5), it appears that "insufficient" refers specifically to the *length* of the leave. In situations such as this one, however, where the employer has a clearly sufficient maternity leave policy that also imposes qualifying conditions such as an "equally applied minimum length of service requirement", (G)(5) is the applicable provision. If the Fifth District had harmonized R.C. Chapter 4112 and all of the provisions of O.A.C. 4112-5-05(G), the Court would have concluded that denial of leave to a pregnant employee who was not eligible for leave under Pataskala Oaks' reasonable and sufficient maternity leave policy does not constitute pregnancy discrimination under Ohio law. Under this reasonable interpretation of the regulations, Pataskala Oaks' policy is clearly legal, and the termination of McFee's employment was not pregnancy discrimination.

The Fifth District's assertion that (G)(5) does not apply to termination cases, because termination is not a condition of employment, is unsupported by Chapter 4112, O.A.C. 4112-5-

05(G), and case law. *See, e.g., Coleman v. ARC Automotive, Inc.* (C.A.6 Nov. 14, 2007), 255 Fed. Appx. 948, 951 (“[a] materially adverse change [in the terms and conditions of employment] might be indicated by a termination of employment . . .”) (citations omitted). In fact, the Fifth District provided no guidance as to when O.A.C. 4112-5-05(G)(5) would apply, if not to the factual situation presented in this case. A proper application of the plain language of the regulations, read as a whole, compels the conclusion that O.A.C. 4112-5-05(G)(5) does apply in this case, and that termination of McFee’s employment because she had not fulfilled Pataskala Oaks’ reasonable length of service requirement did not constitute discrimination on the basis of her pregnancy.

Case law supports Pataskala Oaks’ interpretation of O.A.C. 4112-5-05(G), permitting employers to establish a length of service requirement in their leave of absence policies. In *Johnson v. Watkins Motor Lines, Inc.* (2001), 2001 Ohio Civil Rights Comm. LEXIS 10, at *3-4, the employer terminated a pregnant employee pursuant to its attendance policy, where the employee was not eligible for a leave of absence under a policy that required six months employment to be eligible. The ALJ found that O.A.C. 4112-5-05(G)(5) applies “specifically to those situations where an employer has a minimum length of service requirement.” *Id.* at *8-9. The ALJ rejected the OCRC’s argument that O.A.C. 4112-5-05(G)(2) applied, because “Adm. Code 4112-5-05(G)(5) is a specific provision and thus takes precedence over the more general provision.” *Id.* at *9-10. Accordingly, the ALJ held that the employer’s policy provided sufficient maternity leave and complied with O.A.C. 4112-5-05(G)(2). *See also Murphy v. Airborne Freight Corp.* (Nov. 5, 2004), Franklin C.P. No. 03 CVC10-12033.

Unlike the present case, *California Federal Savings and Loan Association v. Guerra* (1987), 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613, cited extensively by the Court of Appeals,

involved a legislatively enacted statute, which differs from the provisions of the O.A.C. at issue here. Specifically, California amended its Fair Employment and Housing Act to expressly require employers to give female employees an unpaid pregnancy disability leave of up to four months. The focus of that case was whether Title VII preempted California's statute, which is wholly different from the issue at hand: whether Pataskala Oaks' leave policy violates Ohio's pregnancy discrimination law.

Furthermore, unlike the *Johnson* and *Murphy* cases cited above, which directly stand for the proposition that termination of an employee pursuant to the terms of a maternity leave policy under which the employee does not qualify for leave due to a length of service requirement does not violate Ohio law, *Woodworth v. Concord Mgt. Ltd.* (S.D. Ohio 2000), 164 F.Supp.2d 978, relied upon by the Fifth District, is clearly distinguishable. In *Woodworth*, the employer had *no* established maternity leave policy. It granted the plaintiff maternity leave, in its sole discretion, until June 14, 1999. It then terminated plaintiff's position on June 4, 1999. In support of its termination, Concord cited its policy that "an employee's position may not be held open during a leave of absence" as its legitimate, non-discriminatory reason for the termination. Concord also argued that, because the plaintiff was physically capable of working at the time of the termination, she received "adequate" maternity leave prior to her termination. The plaintiff, however, submitted evidence that she was replaced by an employee who had been given longer leave than she had for non-pregnancy related reasons. The *Woodworth* decision does not address whether an employer can adopt a reasonable maternity leave policy with consistently applied length of service requirements. Therefore, it provides no guidance to the issue in this case.

Likewise, the Court of Appeals' reliance on *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App.3d 610, 617, 617 N.E.2d 774, is misplaced. In *Frank*, the plaintiff was hired by

Toledo Hospital, which requires all new employees to undergo a rubella titer test as a precondition of employment. If the test reveals that the employee's titer falls below a certain threshold, the new hire is required to receive a rubella vaccination. The plaintiff's test results mandated a rubella vaccine under the hospital's policy. Because the plaintiff was pregnant, she refused the vaccine and was terminated. She filed suit, claiming that she was disparately treated on the basis of her pregnancy because she was not offered maternity leave in lieu of termination. The plaintiff did not submit any evidence of other employees with low titer who, for reasons other than pregnancy could not take the rubella vaccine, and therefore, she did not establish that her termination was because of her pregnancy. In response to the plaintiff's argument that she should have been offered leave in lieu of termination because she was pregnant, the Court stated:

This argument amounts to a proposition that any time an employer wishes to terminate a pregnant employee, it must offer her leave in lieu of termination, even if her pregnancy is not a factor in the termination. The failure to make leave available to a pregnant employee in lieu of terminating her is not discriminatory, however, unless it is shown that such employee was terminated because of, or on the basis of, sex, including pregnancy.

Frank v. Toledo Hosp., 84 Ohio App.3d at 618. Thus, the *Frank* case supports Pataskala Oaks' proposition in the instant case: McFee was not terminated because of her pregnancy but because she did not qualify for leave under the employer's uniformly applied policy. Pataskala Oaks was not obligated to offer her leave beyond that offered to all similarly-situated employees, nor did its application of its uniformly applied leave policy constitute a termination *because of* her pregnancy.

Proposition of Law No. 3. The *McDonnell Douglas* framework applies to Ohio pregnancy discrimination claims, thereby requiring evidence of discriminatory intent in order for an employer to be found liable.

The Fifth District held, without citation to any authority, that McFee's pregnancy discrimination claim was not subject to the *McDonnell Douglas* framework, because McFee's

termination constituted direct evidence of sex discrimination. The Fifth District's holding conflicts with decisions by the Supreme Court of Ohio, other Ohio Courts of Appeals, federal courts, and decisions by the OCRC itself, which apply *McDonnell Douglas* in similar and analogous factual scenarios under Ohio law. See *Allen v. totes/Isotoner Corp.* (Aug. 27, 2009), Slip Opinion No. 2009-Ohio-4231 (citing two cases that apply *McDonnell Douglas* -- *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 197-198, 20 O.O.3d 200, 421 N.E.2d 128 and *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 506-507, 113 S.Ct. 2742, 125 L.Ed.2d 407 -- where employee was terminated for taking unauthorized breaks, for lactation purposes); *McConaughy v. Boswell Oil Co.* (1st Dist. 1998), 126 Ohio App.3d 820, 711 N.E.2d 719 (applying *McDonnell Douglas* where employee was terminated after exhausting her FMLA leave and two days after childbirth); *Frantz v. Beechmont Pet Hosp.* (1st Dist. 1996), 117 Ohio App.3d 351, 690 N.E.2d 897 (applying *McDonnell Douglas* where employee was terminated for allegedly failing to communicate her plans for returning from maternity leave); *Parker v. Bank One, N.A.* (Mar. 30, 2001), 2d Dist. No. 18573, 2001 Ohio App. LEXIS 1491 (applying *McDonnell Douglas* where employee's position was filled before she returned from maternity leave); *Frank v. Toledo Hosp.* (6th Dist. 1992), 84 Ohio App.3d 610, 615, 617 N.E.2d 774 (applying *McDonnell Douglas* where pregnant employee was terminated for refusing a required rubella vaccine); *Marvel Consultants, Inc. v. Ohio Civ. Rights Comm.* (8th Dist. 1994), 93 Ohio App.3d 838 (applying *McDonnell Douglas* where employer did not reinstate employee to her original position following her maternity leave); *Priest v. TFH-EB, Inc.* (10th Dist. 1998), 127 Ohio App.3d 159, 166, 639 N.E.2d 1265 (applying *McDonnell Douglas* where terminated pregnant employee alleged a pregnancy discrimination claim based on her employer's "failure to accommodate her request to lessen the

amount of tobacco smoke in her work area"); *Woodworth v. Concord Mgt. Ltd.* (S.D.Ohio 2000), 164 F.Supp.2d 978 (applying *McDonnell Douglas* where employee was terminated before the end of her approved maternity leave); *Mullet v. Wayne-Dalton Corp.* (N.D.Ohio 2004), 338 F.Supp.2d 806 (applying *McDonnell Douglas* where employer terminated pregnant employee pursuant to uniformly applied policy to terminate employees who did not return to work upon expiration of a 30-day personal leave of absence); *Wahoff v. Aero Fulfillment Servs. Corp.* (2004), 2004 Ohio Civil Rights Comm. LEXIS 14 (applying *McDonnell Douglas* where employee returning from maternity leave was offered an open position, different from the position she held prior to her maternity leave, pursuant to the employer's leave of absence policy); and *Havens v. McKeeson HBOC, Inc.* (2002), 2002 Ohio Civil Rights Comm. LEXIS 2 (applying *McDonnell Douglas* where employer terminated pregnant employee who exceeded the 12 weeks of leave permitted by employer's policy).

Rather than apply the well-established *McDonnell Douglas* test, the Fifth District held that Pataskala Oaks' failure to provide McFee maternity leave, in violation of the administrative regulations as interpreted by that Court, constituted *per se* pregnancy discrimination. The effect of the Fifth District's holding was to impermissibly bestow upon the OCRC the ability to propose and adopt rules that alter the proof requirements between litigants. "Altering proof requirements is a public policy determined by the General Assembly because the General Assembly, as opposed to administrative agencies, has the authority and accountability to dictate public policy." *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 568, 697 N.E.2d 198.

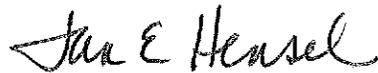
The Fifth District provided no authority for its dramatic departure from well-established law. This departure does not withstand scrutiny. The OCRC simply does not have the legal authority to enact a mandatory leave law through its interpretive regulations and declare that

violation of these regulations -- which go far beyond the requirements established by the governing statute -- constitutes *per se* pregnancy discrimination. Because the decision of the Fifth District Court of Appeals impermissibly alters the well-established landscape of proof under Ohio's laws prohibiting discrimination and renders the Administrative Code regulations interpreting that law invalid, it must be reversed.

III. CONCLUSION

The decision by the Fifth District Court of Appeals, holding that the termination of McFee's employment was *per se* pregnancy discrimination, must be reversed for the reasons discussed in this Merits Brief. Ohio Revised Code Chapter 4112 is an anti-discrimination statute, not a mandatory leave statute. Under Chapter 4112 and Ohio Administrative Code 4112-5-05, an Ohio employer may establish a neutral leave of absence policy that requires all employees to meet a minimum length of service requirement to qualify for leave, including maternity leave. The interpretation that O.A.C. 4112-5-05 mandates maternity leave, regardless of the employer's policy and its length of service requirements, exceeds the scope of Chapter 4112 and renders the regulation invalid. Finally, the burden-shifting framework of *McDonnell Douglas* applies to Ohio pregnancy discrimination claims, thereby requiring evidence of discriminatory intent for an employer to be found liable. Pataskala Oaks respectfully requests the Supreme Court to adopt these Propositions of Law and reverse the decision below.

Respectfully submitted,



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IV. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant was served by regular U.S. mail, postage prepaid, upon Patrick M. Dull, Assistant Attorney General, 30 East Broad Street, 15th Floor, Columbus, Ohio 43215-3248, this 25th day of September, 2009.



Jan E. Hensel (0040785)

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IN THE SUPREME COURT OF OHIO

NURSING CARE MANAGEMENT OF
AMERICA d/b/a PATASKALA OAKS
CARE CENTER,

Appellant,

vs.

OHIO CIVIL RIGHTS COMMISSION,

Appellee.

09-0756

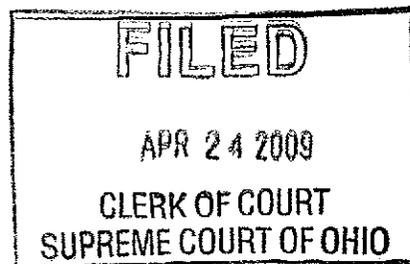
On Appeal from the Licking
County Court of Appeals
Fifth Appellate District
Case No. 08CA0030

NOTICE OF APPEAL OF APPELLANT, NURSING CARE MANAGEMENT
OF AMERICA, INC., d/b/a PATASKALA OAKS CARE CENTER

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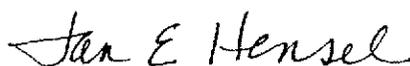
COUNSEL FOR APPELLEE
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NOTICE OF APPEAL

Appellant, Nursing Care Management of America, Inc., d/b/a Pataskala Oaks Care Center hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Licking County Court of Appeals, 5th Judicial District, entered in Court of Appeals Case No. 08CA0030 on March 11, 2009.

This case raises a question of public or great general interest.

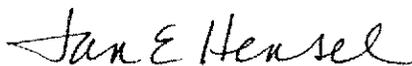
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served by regular U.S. mail, postage prepaid, upon Patrick M. Dull, Assistant Attorney General, 30 East Broad Street, 15th Floor, Columbus, Ohio 43215-3248, this 24th day of April, 2009.



Jan E. Hensel (0040785)

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FILED

FIFTH APPELLATE DISTRICT

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NURSING CARE MANAGEMENT OF
AMERICA, INC. D/B/A PATASKALA
OAKS CARE CENTER

CLERK OF COURT
OF APPEALS
LICKING COUNTY, OH
GARY R. WALKERS

Appellee

-vs-

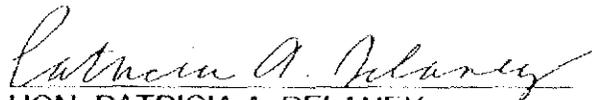
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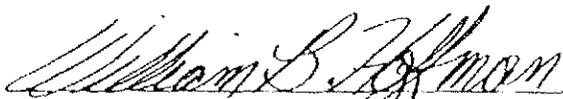
OHIO CIVIL RIGHTS COMMISSION

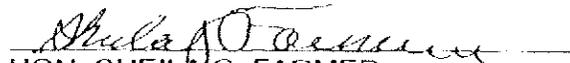
Appellant

Case No. 08CA0030

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is reversed. Costs assessed to Appellee.


HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

FILED

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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NURSING CARE MANAGEMENT OF
AMERICA, INC. D/B/A PATASKALA
OAKS CARE CENTER

Appellee

-vs-

OHIO CIVIL RIGHTS COMMISSION

Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 08CA0030

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas Court Case No. 07CV0488

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

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Delaney, J.

{¶1} The Ohio Civil Rights Commission (“Commission”) appeals the February 11, 2008, judgment entry of the Licking County Court of Common reversing the final order of the Commission in this pregnancy discrimination case. For the reasons that follow, we reverse the judgment of the common pleas court and affirm the final order of the Commission.

{¶2} The parties stipulated to the following facts:

{¶3} Tiffany McFee was hired by Pataskala Oaks as a Licensed Practical Nurse on June 9, 2003. At the time of McFee’s hire, and at all relevent times, Pataskala Oaks had a leave policy that permitted twelve weeks of leave for those employees with at least one year of service. The leave policy is contained in its employee handbook which McFee received upon beginning employment.

{¶4} About eight months later, on January 26, 2004, McFee provided Pataskala Oaks with a physician’s note, which stated that she was medically unable to work due to pregnancy-related swelling. The physician’s note stated that McFee could return to work six weeks following her delivery. Ms. McFee gave birth a few days later, on February 1, 2004.¹

{¶5} Pataskala Oaks terminated her three days after the birth of her child, on February 4, 2004. McFee was terminated because she did not qualify for leave under the leave policy, as at the time of her request for leave, McFee had been employed for less than one year.

¹ Assuming a normal gestation period of 38-40 weeks, McFee was 5-7 weeks pregnant at the time she began employment with Pataskala Oaks.

{¶6} McFee was able to return to work on March 15, 2004, six weeks after giving birth. Pataskala Oaks' Director of Nursing contacted McFee on February 25, 2004, and left a telephone message informing McFee a full-time day shift position at Pataskala Oaks was available and instructed McFee to contact her if interested. McFee never returned the call. At all times after February 25, 2004, Pataskala Oaks would have re-hired McFee; however, McFee never contacted Pataskala Oaks.

{¶7} Although McFee applied for several jobs after March 15, 2004, she was unsuccessful in obtaining employment until November 19, 2004. On that day, McFee was hired as a licensed practical nurse at Adam's Lane Care Center, where she continues to be employed.

STATEMENT OF THE CASE

{¶8} McFee filed a charge affidavit with the Ohio Civil Rights Commission on March 2, 2004, alleging that she had been unlawfully terminated due to her pregnancy. After the Commission received the charge, it investigated the case, and found it probable that Pataskala Oaks violated R.C. 4112. After conciliation efforts failed, the Commission issued Administrative Complaint No. 9816.

{¶9} All relevant facts were stipulated and submitted to an Administrative Law Judge ("ALJ"). On December 19, 2006, the ALJ recommended that the Commission dismiss the complaint. The Ohio Attorney's General Office filed Objections to this recommendation, arguing the ALJ's analysis was legally flawed.

{¶10} Oral argument was held on February 1, 2007. Subsequently, the Commission rejected the ALJ's recommendation and issued a final order on March 1, 2007. The Commission held that the termination of McFee's employment was due

simply to her need for maternity leave, and that this violated Ohio's laws against pregnancy discrimination.

{¶11} Pataskala Oaks filed a Petition for Judicial Review with the Licking County Court of Common Pleas on April 2, 2007. After briefing, the lower court issued a judgment entry on February 11, 2008, reversing the Commission. The Commission filed a timely notice of appeal with this Court on March 10, 2008.

{¶12} The Commission raises two Assignments of Error:

{¶13} "I. THE COURT OF COMMON PLEAS ERRED IN HOLDING THAT THE TERMINATION OF A PREGNANT EMPLOYEE SOLELY DUE TO HER NEED FOR MATERNITY LEAVE IS NOT A TERMINATION "BECAUSE OF PREGNANCY." (JUDGMENT ENTRY, P. 5-8, ATTACHMENT 1 OF APPENDIX).

{¶14} "II. THE COURT OF COMMON PLEAS ERRED WHEN IT APPLIED THE MCDONNELL DOUGLAS PRIMA FACIE BURDEN-SHIFTING ANALYSIS IN A CASE INVOLVING AN EMPLOYER'S FAILURE TO SATISFY ITS AFFIRMATIVE DUTY TO PROVIDE MATERNITY LEAVE FOR A REASONABLE PERIOD OF TIME. (JUDGMENT ENTRY, P. 3-5, ATTACHMENT 1 OF APPENDIX).

{¶15} In addressing and analyzing these assignments of errors, we must first set forth our standard of review. As the parties have stipulated to the facts, there was no conflicting evidence before the Commission requiring resolution. Rather, the issue before the Commission involved the interpretation and application of law to the evidence. On the question of whether an agency's order was in accordance with law, an appellate court's review is plenary. *Leslie v. Ohio Dept. of Development*, 171 Ohio App.3d 55, 869 N.E.2d 687, 2007-Ohio-1170, citing *University Hospital v. State*

Employment Relations Board (1992), 63 Ohio St.3d 339, 587 N.E.2d 835; *HCMC, Inc. v. Ohio Dept. of Job and Family Services*, 10th Dist. No. 08AP-144, 2008-Ohio-6223, ¶17.

{¶16} We will simultaneously address the legal arguments presented by the Commission in both assignments of error.

{¶17} It is the position of the Commission that under Ohio law an employer must provide reasonable maternity leave regardless of its leave policy. Pataskala Oaks contends Ohio law allows an employer to place a length of service requirement on leave time provided to pregnant employees, as long as that length of service requirement is evenly applied. The trial court agreed with the position of Pataskala Oaks and reversed the Commission.

{¶18} In their briefs to this Court, the parties agree the resolution of this issue depends upon the application and interpretation of Ohio R.C. 4112.02 and the implementing regulations set forth in Ohio Adm. Code 4112-5-05 regarding pregnancy discrimination.

{¶19} R.C. 4112.02 provides, in pertinent part:

{¶20} "It shall be an unlawful discriminatory practice:

{¶21} "(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges or employment, or any matter directly or indirectly related to employment."

{¶22} R.C. 4112.01 provides, in relevant part:

{¶23} "(B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, * * *."

{¶24} Ohio R.C. 4112.08 also requires that R.C. Chapter 4112 "shall be construed liberally for the accomplishment of its purpose, and any law inconsistent with any provision of this chapter shall not apply." See also, R.C. 1.11 ("Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.")

{¶25} The parties stipulated that Pataskala Oaks is an "employer" as defined by R.C. 4112.01(A)(2) and thus subject to R.C Chapter 4112.

{¶26} The administrative regulations carrying out the prohibition against discrimination in Ohio are set forth in Ohio Adm. Code Chapter 4112-5. The administrative regulations apply to sex and disability discrimination.

{¶27} Ohio Adm. Code 4112-5-01 provides:

{¶28} "The purpose of the following rules and regulations on discrimination is to assure compliance with the provisions of Chapter 4112 of the Revised Code. These rules express the Ohio civil rights commission's interpretation of language in Chapter

4112 of the Revised Code and indicate factors which the commission will consider in determining whether or not there has been a violation of the law. Such rules apply to every action which falls within the coverage of Chapter 4112 of the Revised Code, and are not intended to either expand or contract the coverage of the Chapter 4112 of the Revised Code.”

{¶29} In regards to sex discrimination, Ohio Adm. Code 4112-5-05 states, in pertinent part:

{¶30} “(G) Pregnancy and childbirth.

{¶31} “(1) A written or unwritten employment policy or practice which excludes from employment applicants or employee because of pregnancy is a prima facie violation of the prohibitions against sex discrimination contained in Chapter 4112 of the Revised Code.

{¶32} “(2) Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.

{¶33} “(3) Written and unwritten employment policies involving commencement and duration of maternity leave shall be so construed as to provide for individual capacities and the medical status of the women involved.

{¶34} “(4) Employment policies involving accrual of seniority and all other benefits and privileges of employment, including company-sponsored sickness and accident insurance plans, shall be applied to disability due to pregnancy and childbirth

on the same terms and conditions as they are applied to other temporary leaves of absences of the same classification under such employment policies.

{¶35} “(5) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer’s leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer’s leave policy.

{¶36} “(6) Notwithstanding paragraphs (G)(1) to (G)(5) of this rule, if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original position or to a position of like status and pay, without loss of service credits.”

{¶37} We note R.C. 4112.02 is similar to the federal Pregnancy Discrimination Act (“PDA”) provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., and the Ohio Supreme Court has held that federal case law interpreting Title VII is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Comm. V. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128. The purpose of Title VII is “to achieve

equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of ...employees over other employees.” *Griggs v. Duke Power Co.*, (1971) 401 U.S. 424, 429-430, 91 S.Ct. 849, 852-853, 28 L.Ed.2d 158 (the disparate impact of facially neutral employment policies “cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices”).

{¶38} In *California Federal Savings and Loan Assoc. v. Guerra*, (1987) 479 U.S. 272, 285, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) the U.S. Supreme Court noted that “Congress intended the PDA to be ‘a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise.’” In *Guerra*, the high Court analyzed a California statute that required employers to provide female employees unpaid pregnancy disability leave of up to four months. The state agency authorized to interpret the statute, the Fair Employment and Housing Commission, construed the statute to require California employers to reinstate an employee returning from such pregnancy leave to the job she previously held, unless it is no longer available due to business necessity. In the latter case, the employer must make a reasonable, good faith effort to place the employee in a substantially similar job.

{¶39} A California employer and trade associations sought a declaration that the statute was inconsistent with and was pre-empted by Title VII. The District Court agreed, finding that “California state law and policies of interpretation and enforcement ... which require preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions are pre-empted by Title VII and are null, void, invalid and inoperative under the Supremacy Clause of the United States Constitution.”

California Federal Sav. And Loan Ass'n v. Guerra, 1984 WL 943, 34 Fair Empl.Prac.Cas (BNA) 562, 33 Empl. Prac. Dec. P 34, 227 (C.D.Cal. Mar 21, 1984).

{¶40} The United States Court of Appeals for the Ninth Circuit reversed. *California Federal Sav. And Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir.1985). It held that "the district court's conclusion that [the law] discriminates against men on the basis of pregnancy defies common sense, misinterprets case law, and flouts Title VII and the PDA." *Id.* at 393 (footnote omitted). The Court of Appeals found that the PDA does not "demand that state law be blind to pregnancy's existence." *Id.* at 395. Because it found that the California statute furthers the goal of equal employment opportunity for women, it concluded: "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with nor unlawful under Title VII." *Id.*

{¶41} The U.S Supreme Court affirmed. Justice Marshall delivered the Court's opinion and noted that the California law promotes equal employment opportunity by ensuring that women will not lose their jobs on account of pregnancy disability. *Guerra*, at 288 (footnote omitted). The law "does not compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating "women affected by pregnancy" no better than "other persons not so affected but similar in their ability or inability to work." *Id.* at 289.

{¶42} Importantly, the U.S. Supreme Court also stated: "The statute is narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy,

childbirth, or related medical conditions. Accordingly, unlike the protective labor legislation prevalent earlier in this century, (footnote omitted) [the statute] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based upon such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity." *Id.* at 290 (citations omitted)(emphasis in the original).

{¶43} Justice Stevens wrote in his concurring opinion: "In *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.E.2d 480 (1979), the Court rejected the argument that Title VII prohibits all preferential treatment of the disadvantaged classes that the statute was enacted to protect. The plain words of Title VII, which would have led to a contrary result, were read in the context of the statute's enactment and its purpose (footnote omitted). In this case as well, the language of the Act seems to mandate treating pregnant employees the same as other employees. I cannot, however, ignore the fact the PDA is a definitional section of Title VII's prohibition against gender-based discrimination. Had *Weber* interpreted Title VII to draw a distinction between discrimination *against* members of the protected class and special preference *in favor of* members of that class, I do not accept the proposition that the PDA requires absolute neutrality. * * * This is not to say, however, that all preferential treatment of pregnancy is automatically beyond the scope of the PDA (footnote omitted). Rather, as with other parts of Title VII, preferential treatment of the disadvantaged class is only permissible so long as it is consistent with "accomplish[ing] the goal that Congress designed Title VII to achieve." *Id.* at 294 (emphasis in original).

{¶44} In order to accomplish the goal of the PDA to protect a woman's right to both work and have a family, the Commission contends Ohio has adopted a "very sensible approach" – maternity leave must be provided for a "reasonable period of time" as set forth in Ohio Adm. Code 4112-5-05(G). Specifically, the Commission relies upon provision (G)(2), stated above, in concluding Pataskala Oaks committed unlawful sex discrimination because it terminated McFee when no maternity leave was available within the first year of employment.

{¶45} Pataskala Oaks, on the other hand, contends that provision (G)(5) permits it to terminate McFee because she did not qualify for leave under its leave policy. Pataskala Oaks argues the Commission's reliance upon provision (G)(2) is misplaced because it had a leave policy that was facially neutral as it draws no distinction between pregnant and non-pregnant employees. Pataskala Oaks argues had McFee sought leave for a reason other than pregnancy she still would have been terminated.

{¶46} We begin our analysis of the parties' positions by making the following observations: first, it is undisputed that no maternity leave was available to McFee in her first year of employment at Pataskala Oaks; second, McFee was temporarily disabled due to pregnancy and childbirth; and third, Pataskala Oaks did not consider childbearing a justification for leave of absence within McFee's first year of employment.

{¶47} At this juncture we are mindful of the longstanding accepted principal that a reviewing court must give deference to an administrative agency's interpretation of its own rules and regulations where such interpretation is reasonable and consistent with the plain language of the statute and rule. *HCMC, Inc. v. Ohio Dept. of Job and Family Services*, supra at ¶24; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d

384, 856 N.E.2d 940, 2006-Ohio-5853. And, as noted earlier, the Commission promulgated Ohio Adm. Code 4112-5 to “express the Ohio civil rights commission’s interpretation of language in Chapter 4112 of the Revised Code and [to] indicate factors which the commission will consider in determining whether or not there has been a violation of the law.” Ohio Adm. Code 4112-5-01.

{¶48} Upon review, this Court finds the language set forth in Ohio Adm. Code 4112-5-05(G) is unambiguous; therefore we apply the plain and ordinary meaning to the words as written. The only provision in Ohio Adm. Code 4112-5-05(G) that specifically applies to termination of employment is provision (G)(2). It explicitly provides that termination of an employee disabled due to pregnancy is prohibited if the employer provides no maternity leave or insufficient maternity under its employment policy. In this case, it is undisputed that Pataskala Oaks had no maternity leave available to McFee at the time of her pregnancy disability. Therefore, the Commission is correct in relying on provision (G)(2).

{¶49} Pataskala Oaks does not address provision (G)(2). Rather, it claims that provision (G)(5) which pertains to a woman’s “conditions of employment” permits it to terminate McFee because she did not qualify for leave.² We disagree. As an initial matter, we find the common usage of “termination” ordinarily is not associated with a “condition” of employment. Rather, it signifies the end of employment, not the continuation of it to which any “conditions” would apply. Secondly, nowhere in provision

² Pataskala Oaks also contends that a ruling by a hearing examiner in *Johnson v. Watkins Motor Lines, Inc.* (Oct. 3, 2001), Ohio Civil Rights Comm. LEXIS 10, authorized a similar leave policy and specifically endorses minimum length of service requirements. As this Court’s review is plenary, we are not bound by the hearing examiner’s ruling on questions of law. See, *Ohio Consumers’ Counsel v. Public Utilities Comm.*, 111 Ohio St.3d 384, 856 N.E.2d 940, 2006-Ohio-940, at ¶42-43. Pataskala Oaks reliance on *Piraino v. Int’l Orientation Resources, Inc.*, 137 F.3d 987 (7th Cir. 1997) also is misplaced. In that case, the court did not address any state laws similar to Ohio’s or a state’s ability to offer broader protections than the PDA.

(G)(5) is termination authorized if an employee does not meet a length of service requirement. Rather, it expressly provides “[w]omen shall not be penalized in their conditions of employment because they require time away from work on account of childbearing.” Not surprisingly, Pataskala Oaks does not address this first sentence in provision (G)(5). Obviously one of the greatest penalties in the employment relationship is termination.

{¶50} We also find the Commission’s interpretation is consistent with goals of the PDA and R.C. 4112.02 by promoting equal employment opportunity by ensuring that women will not lose their jobs on account of pregnancy disability. It ensures a female employee is not put in a position of choosing between her job and the continuation of her pregnancy, a dilemma which would never face a male employee in the first year of employment at Pataskala Oaks. Both sexes are entitled to have a family without losing their jobs, to hold otherwise would be to completely ignore the plain language of Ohio Adm. Code 4112-5-05(G)(2).

{¶51} Other Ohio court decisions support this same analysis. See, *Asad v. Continental Airlines, Inc.*, 328 F.Supp.2d 772 (N.D. Ohio, 2004) (“The purpose of Title VII, including the PDA, is ‘to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of ... employees over other employees.’ *Guerra*, 479 U.S. at 288, 107 S.Ct. 683 (citations omitted). As demonstrated by its legislative history, the PDA was enacted to “guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.” *Id.* at 289, 107 S.Ct. 683; *Johnson Controls*, 499 U.S. at 204, 111 S.Ct. 1196 (explaining that “[w]omen as capable of doing

their jobs as their male counterparts may not be forced to choose between having a child and having a job"). With the PDA, Congress made evident that it was protecting the decisional autonomy of women to become pregnant and to work while pregnant. *Johnson Controls*, 499 U.S. at 205-207, 111 S.Ct. 1196. Because the PDA is specifically designed to provide relief to working women and to end discrimination against pregnant workers, it does not preclude preferential treatment of pregnant workers. *Guerra*, at 285-86, 107 S.Ct. 683; *Harness v. Hartz Mountain Corp.*, 877 F.2d 1307, 1310 (6th Cir.1989").)

{¶52} See also, *Woodworth v. Concord Management Limited* (2000), 164 F.Supp.2d 978 (S.D. Ohio) ("The Ohio Administrative Code plainly indicates that new mothers 'must be granted a reasonable leave on account of childbearing.' Ohio Admin. Code § 4112-5-05(G)(5) * * * Denial of maternity leave mandated by the Ohio Administrative Code 'is, in effect, terminating the employee because of her pregnancy.'"(citation omitted); *Frank v. Toledo Hosp.* (1992), 84 Ohio App. 3d 610, 617, 617 N.E.2d 774 ("The purpose of Ohio Adm. Code 4112-5-05(G)(2) and (6) is clearly to provide substantial equality of employment opportunity by prohibiting an employer from terminating a female worker because of pregnancy without offering her a leave of absence, even if not disability leave is available generally to employees.").

{¶53} In this case, Pataskala Oaks does not deny that McFee requested maternity leave, and that it terminated McFee without providing her maternity leave for a reasonable period of time. Pursuant to Ohio Adm. Code 4112-05-05(G)(2) such termination "shall constitute unlawful sex discrimination". We agree with the Commission that motive is irrelevant in light of Ohio's requirement for maternity leave

for a "reasonable period of time". Therefore, direct evidence of pregnancy discrimination has been presented by McFee and her claim is not subject to the now familiar burden-shifting framework established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and revisited in *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 which apply in cases where claims are not premised on direct evidence of discrimination.

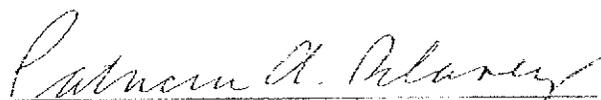
{¶54} Consistent with the weight of authority, we find the Commission interpreted and applied the relevant statutes in a lawful and proper way and its final order should therefore be affirmed.

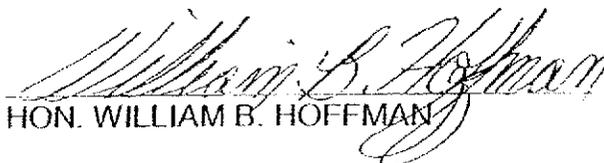
{¶55} The Commission's first and second assignments of error are sustained.

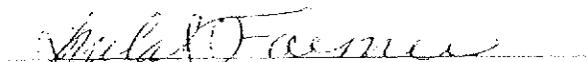
By: Delaney, J.

Hoffman, P.J.

Farmer, J. concur.


HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Nursing Care Management of America,
Inc. d/b/a Pataskala Oaks Care Center

Appellant,

v

Ohio Civil Rights Commission,

Appellee

2007 FEB 11 P 4:06
CASE NO 07 CV 00488
FILED
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JUDGMENT ENTRY

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on an appeal of a final order of the Ohio Civil Rights Commission issued March 1, 2007. This appeal was taken pursuant to R.C. 4112.06

II. FACTS

Tiffany McFee was employed by appellant beginning June 9, 2003. On January 6, 2004, McFee provided appellant with a physician's note that stated she was medically unable to work due to a pregnancy-related condition, and she requested leave. Appellant fired McFee on February 4, 2004 according to its medical leave policy, which required that an employee be employed for at least one year before becoming eligible for leave time.

Ms. McFee filed a Charge of Discrimination with the Ohio Civil Rights Commission. The Commission issued a complaint, and the case was submitted to an administrative law judge. On December 19, 2006, the administrative law judge recommended that the Commission dismiss the complaint. The Ohio Attorney General's Office filed objections to the recommendation, and oral arguments were held before the Commission on February 1, 2007. The Commission issued its final order in favor of Ms. McFee on March 1, 2007.

Judge
Thomas M. Marcelain
740-670-5777

Judge
Jon R. Spahr
740-670-5770

Courthouse
Columbus, OH 43055

III. STANDARD OF REVIEW

"The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole." R.C. 4112.06(E), *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192. "In the absence of a legally significant reason for discrediting a determination of the Ohio Civil Rights Commission, a common pleas court must give due deference to the commission's resolution of evidentiary conflicts." *Cleveland Civil Service Com'n v. Ohio Civil Rights Com'n* (1991), 57 Ohio St.3d 62, 65. On the question of whether an agency's order was in accordance with law, a court's review is plenary. *Leslie v. Ohio Dept. of Dev.* (2007), 171 Ohio App. 3d 55, 68.

IV. CONCLUSIONS OF LAW

Appellant submits two assignments of error:

- I. THE OHIO CIVIL RIGHTS COMMISSION FINAL ORDER IS NOT SUPPORTED BY RELIABLE, PROBATIVE, OR SUBSTANTIAL EVIDENCE SINCE THE OHIO CIVIL RIGHTS COMMISSION DID NOT APPLY THE CORRECT LEGAL ANALYSIS.

- II. THE OHIO CIVIL RIGHTS COMMISSION FINAL ORDER IS NOT SUPPORTED BY RELIABLE, PROBATIVE, OR SUBSTANTIAL EVIDENCE SINCE IT IS CONTRARY TO THE OHIO CIVIL RIGHTS COMMISSION'S OWN RULES

The facts in this case are not in dispute. The parties agreed to joint stipulations of fact which were submitted to the administrative law judge. Appellant's assignments of error address questions of law

Assignment of Error I.

R.C. 4112.02 states:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Discrimination on the basis of sex includes discrimination "on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions." R.C. 4112.01(B).

To establish a prima facie case of pregnancy discrimination under R.C. 4112.02, a plaintiff must demonstrate (1) that she was pregnant, (2) that she was discharged, and (3) that a nonpregnant employee similar in ability or inability to work was treated differently. *Hollingsworth v. Time Warner Cable* (2004), 157 Ohio App.3d 539, 549. Once a plaintiff establishes her prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge. *Id.* Once a legitimate, nondiscriminatory reason is proffered, the burden shifts back to the plaintiff to demonstrate that the reason for discharge was a pretext for unlawful discrimination. *Id.* at 550.

According to the parties' joint stipulations, appellant had a policy that provided an employee was not entitled to leave until the employee had been employed for at least one year. (Joint Stipulations ¶5). This policy was applied consistently to all employees. *Id.* Appellant's policy was to terminate an employee upon a request for leave if that employee had not been employed for a year. *Id.* at ¶6. Ms. McFee was terminated because she did not

qualify for leave as she had only been employed by appellant for eight months. *Id.* at ¶¶4, 10-

11.

Ms. McFee failed to make a *prima facie* case for discrimination based upon her pregnancy. Even had she made a *prima facie* showing, it has been stipulated that appellant discharged McFee according to the leave policy— a policy which was applied consistently to all employees. This is a legitimate, nondiscriminatory ground for discharge, and there were no allegations that adherence to the policy was a pretext for discrimination.

The Commission did not find for McFee based upon this analysis, however. In fact, the Commission did not address the requirements of a discrimination claim under R.C. 4112.02(A). Instead, the Commission decided that according to R.C. 4112.01(B), McFee was entitled to leave for pregnancy despite appellant's leave policy.

R.C. 4112.01(B) provides:

For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise.

According to the statute, pregnant employees must be treated the same as employees who are not pregnant in their ability or inability to work.

The Commission determined that Ms. McFee was not treated the same as employees who were not pregnant since appellant provided up to twelve weeks of leave time for other employees. The employees to whom the Commission was comparing McFee, however, were employees who had been employed by appellant for at least a year. These employees were

provided up to twelve weeks of leave time for medical conditions *including pregnancy*. The correct comparison is to an employee who had not been employed at least a year. Such an employee, similar in inability to work, would not be entitled to leave for pregnancy or any medical disability. Despite the Commission's contention, all employees were treated the same under appellant's leave policy. No employee was entitled to leave for any condition for the first year of employment.

Further, as the title of R.C. 4112.01—Definitions—and the first sentence of R.C. 4112.01(B) indicate, discrimination on the basis of sex, for “the purposes of divisions (A) to (F) of section 4112.02,” includes pregnancy and pregnancy-related conditions. R.C. 4112.01(B) requires that pregnant employees be treated the same as other employees of similar inability. It does not relieve a claimant of the requirement to establish a *prima facie* case of pregnancy discrimination.

The Commission incorrectly applied the statute, and failed to apply the proper analysis for a discrimination claim under R.C. 4112.02(A) the third element of which—that an employee similar in ability or inability to work was treated differently—could not be satisfied in this case.

The Court finds appellant's first assignment of error to be well taken.

Assignment of Error II.

The Commission's interpretation of R.C. 4112.01(B) would mandate preferential treatment to pregnant employees over similarly disabled employees within the first year of employment under appellant's leave policy. The Commission argues on appeal that O.A.C. § 4112-5-05 requires this result despite not having discussed or cited this provision in its final order. The Commission correctly argues that O.A.C. § 4112-5-05 requires employers to

consider pregnancy a justification for leave of absence. O.A.C. § 4112-5-05(G)(1). However, the Commission is incorrect in its assertions that leave is required regardless of appellant's leave policy or that appellant did not have a leave policy.

To support the contention that appellant was required to provide McFee with leave time because appellant did not have a leave policy, the Commission cites O.A.C. § 4112-5-05(G)(6). This section states, "Notwithstanding paragraphs (G)(1) to (G)(5) of this rule, if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time." The Commission argues that since employees were not entitled to leave within the first year of employment, appellant did not have a leave policy for those employees. The Commission cites no authority for this contention. What the Commission is asserting is that according to appellant's leave policy, there was no leave policy. O.A.C. § 4112-5-05(G)(6) is simply inapplicable because appellant did in fact have a leave policy.

The essence of the Commission's argument is that appellant's leave policy was invalid because it did not provide pregnancy leave in the first year of employment. Again, the Commission cites no authority for this contention. The language of O.A.C. § 4112-5-05(G), and prior decisions of the Commission refute this contention.

O.A.C. § 4112-5-05(G)(4) states:

Employment policies involving accrual of seniority and all other benefits and privileges of employment, including company-sponsored sickness and accident insurance plans, shall be applied to disability due to pregnancy and childbirth *on the same terms and conditions as they are applied to other temporary leaves of absence of the same classification under such employment policies* (emphasis added)

Further, O.A.C. § 4112-5-05(G)(5) states

Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. *When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave policy* (emphasis added)

These sections clearly contemplate applicable leave policies, including policies that contain "minimum length of service requirements for leave time."

The only provision of the administrative code that conceivably supports the Commission's contention is O.A.C. § 4112-5-05(G)(2), which states, "Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination." According to the Commission, under appellant's policy, insufficient or no maternity leave is available. While leave was not available to Ms. McFee under the policy, the policy did provide pregnancy leave, and did not discriminate against pregnant employees. The policy only discriminated against employees who had not met the minimum length of service requirement regardless of whether they were pregnant or not. Such discrimination does not violate the law, and the Commission cites no authority to the contrary. O.A.C. § 4112-5-05(G)(2), read in light of the other provisions of section (G), does not require appellant to provide pregnancy leave to an employee who has not met the minimum length of service requirement.

What is more, the Commission has previously held that similar minimum length of service requirements for pregnancy leave do not violate OAC 4112-5-05(G) or RC 4112.02.

Johnson v. Watkins Motor Lines, Inc., (December 20, 2001), CRC 8951 (six-month length of service requirement valid as long as it is applicable to other forms of disability); *In re Anderson*, (June 28, 1991), CRC 5540 (six-month length of service requirement valid so long as it is applied equally). Further, in a case appellant cited to the Commission, the Franklin County Court of Common Pleas upheld a one-year minimum length of service requirement on summary judgment in a pregnancy discrimination case similar to Ms. McFee's. *Murphy v Airborne Freight Corp.* (November 5, 2004), Franklin County C.P. No. 03 CVC10-12033.

The Commission cites no authority for the contention that appellant's minimum length of service requirement is unlawful. Appellant's leave policy is not prohibited by R.C. 4112.01 *et seq.* or O.A.C. § 4112-5-05(G). The policy is entirely consistent with these provisions.

The Court finds appellant's second assignment of error to be well taken.

V. CONCLUSION

For the reasons set forth above, appellant's assignments of error are SUSTAINED. The decision of the Ohio Civil Rights Commission is REVERSED, and the complaint is dismissed. Costs to the appellee.

It is so ORDERED. There is no just cause for delay. This is a final, appealable order.


Thomas M. Marcelain, Judge

Copies of the Judgment Entry were mailed by ordinary U.S. Mail to all persons listed below on the date of filing.

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Ohio Civil Rights Commission, 111 E. Broad St., 3rd Flr., Columbus, OH 43205

Tiffany R. McFee, 114 Pierce St., Zanesville, OH 43701



Ted Strickland
Governor

TIFFANY R. MCFEE,)	
)	COMPLAINT NO. 9816
Complainant,)	
)	
vs.)	FINAL ORDER
)	
NURSING CARE MANAGEMENT OF)	
AMERICA, INC. dba)	
PATASKALA OAKS CARE CENTER,)	
)	
Respondent.)	

This matter came before the Ohio Civil Rights Commission (Commission) at its regular meeting on February 1, 2007. At this meeting, the Commission considered its Administrative Law Judge's Report and Recommendation, as well as Objections to this Report filed by the Ohio Attorney General's Office. The Commission hereby incorporates into the record the Objections filed by the Ohio Attorney General's Office.

CASE HISTORY

Tiffany McFee filed a charge affidavit with the Commission on March 2, 2004. After the Commission received the charge, it conducted an investigation, ultimately finding that it was probable that Respondent ("Pataskala Oaks") violated Revised Code Chapter 4112. After conciliation efforts failed, the Commission issued Complaint No. 9816.

All relevant facts were stipulated and submitted to an Administrative Law Judge ("ALJ"). On December 19, 2006, the ALJ issued a Report and Recommendation, which recommended that the Commission dismiss the complaint.

The Ohio Attorney General's Office filed Objections to the Report and Recommendation. Oral argument regarding the Objections was held before the Commission at its February 1, 2007, meeting. After carefully considering the ALJ's Report and Recommendation, and after reviewing the entire record, as well as reviewing the information presented in the Objections and during oral argument, the Commission has decided to disapprove the ALJ's Report and Recommendation, and adopt its own legal findings. Based upon the stipulated evidence in the record and the applicable statutes, the Commission hereby determines that Pataskala Oaks has violated Revised Code Chapter 4112.

The Commission has determined that R.C. 4112.01(B) and R.C. 4112.08 require a result different from the one recommended by the ALJ. As the Commission has the ability to disapprove the written Report and Recommendation of the ALJ, and to issue a Final Order accordingly¹, the Commission hereby determines that Pataskala Oaks has unlawfully discriminated against Ms. McFee in violation of R.C. 4112.

FINDINGS OF FACT

Tiffany McFee was hired by Pataskala Oaks as a Licensed Practical Nurse on June 9, 2003. About eight months later, on January 26, 2004, Ms. McFee provided Pataskala Oaks with a physician's note which stated that she was medically unable to work due to a pregnancy-related medical condition (swelling). The physician's note also stated that Ms. McFee could return to her normal duties six weeks following her delivery. Instead of providing Ms. McFee with the requested leave, however, Pataskala Oaks terminated her on February 4, 2004.

Pataskala Oaks grants up to 12 weeks of leave for employees who are medically unable

¹ R.C. 4112.05(G)(1); O.A.C. 4112-3-09(A), (B), & (C); O.A.C. 4112-3-10; *Board of Edn. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St. 2d 252, 257-258; *Jackson, et al. v. Franklin Cty Animal Control Dept.* (10th C.A., 1987), 1987 Ohio App LEXIS 9144, *6

to work. Even so, Pataskala Oaks' policy only provides this leave for employees who have been employed for one year or more (the "one year policy"). Pataskala Oaks has in fact provided up to 12 weeks of leave for such employees who are unable to work. Nevertheless, Ms. McFee was not afforded any leave at all.

Due to her pregnancy, Ms. McFee was medically unable to work for about 6-7 weeks. Although Pataskala Oaks provides up to 12 weeks of leave for other employees who are unable to work, Ms. McFee was terminated through the application of Pataskala Oaks' one-year policy.

DISCUSSION AND CONCLUSIONS OF LAW

By statute, Ohio prohibits many forms of discrimination. For example, R.C. 4112.02(A) prohibits employment discrimination when that discrimination is "because of" a person's race, color, religion, etc. This same statute also prohibits discrimination "because of" a person's sex. This type of discrimination generally requires evidence demonstrating that the employer's discriminatory actions were *motivated* by (or "because of") the employee's sex. However, Ohio also has a law that *mandates* certain treatment for pregnant women, regardless of motivation.

Pregnancy Discrimination under Ohio Revised Code 4112.01(B)

Ohio not only prohibits sex discrimination, but it also provides specific protection for pregnant women under R.C. 4112.01(B). Unlike the general prohibition against discrimination motivated by sex under R.C. 4112.02(A), however, Ohio's protection for pregnant women does not have a motivational requirement² - instead, R.C. 4112.01(B) contains a *directive* regarding how employers must treat pregnant women:

² This lack of a motivational requirement is not unique to R.C. 4112.01(B) - other provisions of Chapter 4112 also lack a motivational requirement. See, e.g., R.C. 4112.02(F) [directive against publishing advertisements that specify race, color, religion, etc.]; R.C. 4112.02(H)(20) & (22) [directive against failing to comply with building accessibility standards]. In addition, there is no motivational requirement in cases analyzed under the "disparate impact" theory of discrimination. *Little Forest Med. Ctr. v. Ohio Civil Rights Comm.* (1991), 61 Ohio St. 3d 607, 610 ("In a disparate impact case, discriminatory motive is irrelevant.")

“Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” R.C. 4112.01(B) (emphasis added)

Unlike the type of proof required under R.C. 4112.02(A), which typically involves direct evidence of motivation or a “prima facie case” / “pretext” analysis (which infers motivation), the mandate contained in R.C. 4112.01(B) does not call for such scrutiny. Instead, R.C. 4112.01(B) compels specific treatment for pregnant women. The analysis hinges upon whether the employer treats pregnant women “the same” way the employer treats other employees based upon the other employees’ “ability or inability to work.”

The sole criterion for analysis, then, is whether the employer provides leave for other employees who are “similar in their ability or inability to work.” If leave is provided for nonpregnant employees based upon their inability to work, R.C. 4112.01(B) mandates that the same leave be provided to pregnant women.

This criterion was discussed in detail by the Sixth Circuit’s decision in *Ensley Gaines*³

In that case, the Court of Appeals addressed language similar to that of R.C. 4112.01(B)⁴:

When Congress enacted the PDA [Pregnancy Discrimination Act], instead of merely recognizing that discrimination on the basis of pregnancy constitutes unlawful sex discrimination under Title VII, it provided *additional protection* to those “women affected by pregnancy, childbirth or related medical conditions” by expressly requiring that employers provide the same treatment of such individuals as provided for “other persons not so affected but similar in their ability or inability to work.” *** As recognized by the United States Supreme Court, “the second clause [of the PDA] could not be clearer: it mandates that pregnant

3 *Ensley-Gaines v. Runyon* (6th Cir. 1996), 100 F.3d 1220.

4 “Federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, is generally applicable to cases involving alleged violations of R.C. Chapter 4112.” *Plumbers & Steamfitters Comm. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St. 2d 192, 196, 421 N.E.2d 128. “Federal case law is especially relevant here since R.C. 4112.01(B) reads almost verbatim to the Pregnancy Discrimination Act (“PDA”), which amended Title VII by expressly prohibiting discrimination on account of pregnancy.” *Priest v. TFI-EB, Inc.* (1998), 127 Ohio App. 3d 159, 164-165.

employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees *similarly situated with respect to their ability to work*” (emphasis added) *Ensley-Gaines v. Runyon*, at 1226, citing *Int’l Union v. Johnson Controls* (1991), 499 U.S. 187, 204-05.

As a result, when determining how an employer must treat a pregnant woman, the sole criteria is whether the pregnant woman was treated the same as nonpregnant employees “similar in their inability to work.” Criteria other than “inability to work,” such as Pataskala Oaks’ one-year policy, are irrelevant when determining whether an employer has complied with the mandate of R.C. 4112.01(B). *Ensley-Gaines*, at 1226.

This principle has been recognized in Ohio. The Tenth Appellate District has held: “The PDA does not require an employer to overlook the work restrictions of pregnant women unless the employer overlooks the comparable work restrictions of other employees.”⁵ Because Pataskala Oaks “overlooks” the work restrictions of other employees who are unable to work (by providing them with up to 12 weeks of leave), Pataskala Oaks was therefore required by R.C. 4112.01(B) to “overlook” the work restrictions of Ms. McFee, and grant her the same leave.

Pataskala Oaks’ One-Year Policy and “Preferential Treatment”

With its one-year policy, Pataskala Oaks has voluntarily chosen to treat its employees in two different ways – some are terminated, while others are treated preferentially (by being provided with up to 12 weeks of leave). Pataskala Oaks makes this distinction, not upon the person’s ability to work, but instead upon how long the person has been employed. However, R.C. 4112.01(B) does not provide protection based upon length of employment – rather, its protection is based upon a person’s ability or inability to work.

Pataskala Oaks alleges that, based upon its one-year policy, a failure to terminate Ms.

⁵ *Priest v. TFI-EB, Inc.* (1998), 127 Ohio App. 3d 159, 165, citing *Deneen v. Northwest Airlines, Inc.* (8th Cir. 1998), 132 F.3d 431, 437.

McFee would have resulted in impermissible “preferential treatment” for her. The question of “preferential treatment,” however, has arisen solely because the management at Pataskala Oaks has chosen to treat certain employees preferentially to others. This is not a situation where a pregnant woman has asked for leave that is preferential to any other leave granted by the employer - Ms. McFee has not requested anything more than Pataskala Oaks has already provided to other employees who were also unable to work. In fact, Ms. McFee requested considerably *less* – only 6-7 weeks of leave.

Pataskala Oaks is free to retain its one-year policy – except to the point that it conflicts with Ohio law. Pataskala Oaks’ policy, when it provides 12 weeks of leave for employees who are unable to work but denies the same leave to pregnant women who are also unable to work, is, to that extent, inconsistent with R.C. 4112.01(B). To the extent that this policy provides “preferential treatment” for pregnant women, the unique biology of pregnant women (compared to nonpregnant persons) requires no less to ensure that pregnant women are treated “the same” as nonpregnant persons based upon their ability or inability to work.

Pataskala Oaks implies that R.C. 4112.01(B) requires that “the sexes shall be treated exactly alike.” Such a decree, by ignoring biology altogether, would in fact impose an *inequality* on women due to their inherent biological difference. Instead, R.C. 4112.01(B) contains exactly the opposite directive – it provides special protection for *women based upon the biological condition of pregnancy*, and pointedly does not provide men with comparable protection.

By acknowledging the particularly female biological characteristic of pregnancy, Ohio has mandated that it is unlawful sex discrimination to *not* offer pregnant women leave when others persons also “unable to work” are offered that leave. Any so called “preferential

treatment” for pregnant women resulting from Pataskala Oaks’ one-year policy is merely a self-imposed consequence that is irrelevant to the application of 4112.01(B).

The United States Supreme Court has previously addressed the issue of “preferential treatment” for pregnant women.⁶ In *Guerra*, the Court determined that, although the federal PDA does not *require* “preferential treatment,” nothing in the law *prohibits* a state from providing such treatment. In this light, and as discussed in more detail below, it is important to note that Ohio has a special statute that requires its anti-discrimination laws to be liberally construed to ensure the accomplishment of their purposes. R.C. 4112.08.

In the limited scenario at issue in this case, where an employer provides preferential treatment for some of its employees, but denies it to others, R.C. 4112.01(B) mandates that pregnant women shall be treated “the same” based upon their inability to work. In this narrow sense, a liberal construction of the plain language of this law mandates that “the same” preferential treatment (as already provided to other employees unable to work) be provided for pregnant women who are also unable to work.

Liberal Construction under R.C. 4112.08

Ohio Revised Code 4112.08 requires that Chapter 4112 “shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.” Significantly, there is no federal counterpart requiring “liberal construction” in the Pregnancy Discrimination Act.

Revised Code 4112.08 requires a liberal construction of R.C. 4112.01(B) so that it actually “accomplishes its purpose” of providing protection for pregnant women. This concept has been repeatedly utilized by Ohio courts, with the end result being that Ohio’s efforts to end

⁶ *California Federal Sav. & Loan Ass’n v. Guerra* (1987), 107 S. Ct. 683, 692-693

discrimination are not thwarted by overly restrictive interpretations.⁷

Revised Code 4112.08 also states that “any law inconsistent with any provision of this chapter shall not apply.” In a recent decision from the Eighth Appellate District,⁸ the court cited R.C. 4112.08 and held that a city’s own civil service rules cannot supersede (or even limit) the anti-discrimination laws of R.C. 4112. To permit such a result, the *Dworning* court stated, would “be inconsistent with the remedial purposes of R.C. Chapter 4112.” *Id.*, at ¶47.

As this prohibition extends to “any law,” the same prohibition would certainly preclude Pataskala Oaks’ internal one-year policy from limiting Ohio’s protection for pregnant women. Application of Pataskala Oaks’ policy results in pregnant women being terminated despite the fact that other employees, who are similar in their inability to work, are provided with leave. This outcome is inconsistent with the purpose of R.C. 4112.01(B), which is to provide protection for pregnant women. Simply stated, a liberal construction of R.C. 4112.01(B) precludes termination of a pregnant woman when the employer provides up to 12 weeks of leave to nonpregnant employees who are similar in their ability or inability to work.

Discrimination “because of” pregnancy is also unlawful

Although the analysis for this case does not require a motivational element, it is instructive to briefly review the “because of” prohibition found in R.C. 4112.02(A).

⁷ See, *inter alia*, *Genaro v. Cent. Transp.* (1999), 84 Ohio St. 3d 293, 296-297 (citing R.C. 4112.08, the Court extended the definition of “employers” to include individual managers, and stated that “By holding supervisors and managers individually liable for their discriminatory actions, the antidiscrimination purposes of R.C. Chapter 4112 are facilitated, thereby furthering the public policy goals of this state regarding workplace discrimination.”); *Helmick v. Cincinnati Word Processing, Inc.* (April 26, 1988), Franklin 10th App. No. 86AP-1073, unreported, 1988 Ohio App. LEXIS 1656, *10 (“R.C. Chapter 4112 is a remedial statute which is to be construed liberally in order to assure that the rights granted by the statute are not defeated by overly restrictive interpretations.”); *Ohio Civil Rights Comm’n v. Ingram* (1994), 69 Ohio St. 3d 89, 94 (citing R.C. 4112.08, the Court held that “where the amount of back pay that would have been received by a victim of employment discrimination is unclear, any ambiguities should be resolved against the discriminating employer”).

⁸ *Dworning v. City of Euclid* (December 21, 2006), Cuyahoga 8th App. No. 87757, 2006 Ohio 6772.

Discrimination in hiring

It is unlawful in Ohio to “refuse to hire” a woman “because of” her pregnancy. R.C. 4112.02(A), R.C. 4112.01(B). However, Pataskala Oaks’ one-year policy, if upheld, would accomplish in a roundabout manner what employers are prohibited from doing directly. In other words, if an employer wished to avoid hiring pregnant women, but realized the unlawfulness of such an action, all the employer would need to do is establish the type of one-year policy that Pataskala Oaks has in fact established.

A policy requiring the termination of employees needing leave who have less than one year of service would repeatedly result in the termination of any recently-pregnant (or already-pregnant) woman solely due to the fact that she was pregnant. Such a policy, although ostensibly complying with the law prohibiting the refusal to hire a qualified pregnant woman on a Monday, would incongruously result in her permissible termination on a Tuesday when she needs leave, and for the exact same reason - the woman’s pregnancy. Such an inconsistent “loophole” could not have been intended by the General Assembly when it enacted R.C. 4112.01(B) to protect pregnant women in Ohio.

Discrimination in firing

Likewise, it is also unlawful to terminate a woman “because of” her pregnancy. R.C. 4112.02(A), R.C. 4112.01(B). This is because R.C. 4112.01(B), in addition to the directive language discussed above, also incorporates “because of pregnancy” or “on the basis of pregnancy” within the definition of “because of sex,” as that term is used in R.C. 4112.02(A). It is undisputed that Ms. McFee needed leave “on the basis of” her pregnancy, and that this need for leave ultimately resulted in her termination. Consequently, Ms. McFee was terminated

“because of” her pregnancy (and therefore “because of” her sex) in violation of R.C. 4112.02(A).

Pataskala Oaks responds to this by claiming that Ms. McFee was terminated, not “because of” her pregnancy, but instead “because of” her failure to satisfy its one-year policy. This semantic argument is not persuasive – a liberal construction of R.C. 4112.01(B) and R.C. 4112.02(A) cannot result in such overly restrictive interpretations of “because of pregnancy” and “on the basis of pregnancy.” A liberal construction would ensure protection for pregnant women, especially in light of the fact that Pataskala Oaks has treated nonpregnant employees, who were similar in their ability to work, better than Ms. McFee. Under this liberal construction, it is clear that Ms. McFee would not have been terminated had she not been pregnant. Consequently, Ms. McFee was terminated “because of” her pregnancy in violation of R.C. 4112.02(A).

DAMAGES

At the time of her termination on February 4, 2004, Ms. McFee worked 40 hours/week and was paid \$18.50/hour. She gave birth on February 1, 2004, and was able to return to work six weeks afterwards, on March 15, 2004. There was no evidence that Ms. McFee failed to mitigate her damages.⁹

The stipulated facts show that, after Ms. McFee was able to return to work on March 15, 2004, she applied for several jobs. However, she was unsuccessful in obtaining employment until November 19, 2004. On that date, Ms. McFee was hired as a Licensed Practical Nurse at

⁹ Although Pataskala Oaks left a telephone message for Ms. McFee on February 25, 2004, informing her of an available position, there was no evidence that the position was ever actually, and unconditionally, offered to Ms. McFee. Further, there was no evidence that Ms. McFee received the message, which in any event was left several weeks prior to Ms. McFee’s ability to return to work. *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219, 232 (“[A]n employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.”); see also *Jordan v. City of Cleveland* (N.D. Ohio, 2006), 2006 U.S. Dist. LEXIS 76400, *3.

Adams Lane, where she continues to be employed. At the time of the hearing, Adams Lane paid Ms. McFee \$14.03/hour, over \$4.00/hour less than she received at Pataskala Oaks.

CONCLUSION

As a result of the above, Ms. McFee is entitled to reinstatement. R.C. 4112.05(G). Therefore, it is **ORDERED** that Pataskala Oaks offer a Licensed Practical Nurse position to Ms. McFee at a pay rate commensurate with the pay Ms. McFee would have received had she not been terminated, with all interim merit pay increases and all other benefits, within 30 days of the issuance of this Final Order.

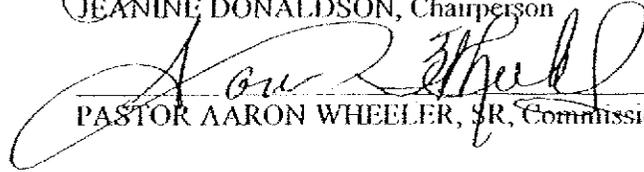
Ms. McFee is also entitled to backpay. R.C. 4112.05(G). Ms. McFee is entitled to the full amount of backpay from the date of her ability to return to work (March 15, 2004) until Pataskala Oaks makes the above-ordered offer. Accordingly, it is **ORDERED** that, based upon her pay as a Licensed Practical Nurse at Pataskala Oaks (\$18.50/hour, 40 hours/week), and the length of time from March 15, 2004, to the issuance of this Final Order (35.5 months), less the amount she has earned at Adam's Lane (\$14.03/hour, 40 hours/week, from November 19, 2004, to the issuance of this Final Order, or 27 months), Pataskala Oaks pay Ms. McFee $[\$18.50/\text{hour} \times 40 \text{ hours/week} \times 35.5 \text{ months} \times 4 \text{ weeks/month}] - [\$14.03/\text{hour} \times 40 \text{ hours/week} \times 27 \text{ months} \times 4 \text{ weeks/month}] = \$44,470.40$, plus all intervening merit pay increases and all other benefits, within 30 days of the issuance of this Final Order. This amount will continue to accrue until Pataskala Oaks makes the above-ordered offer to Ms. McFee.

Finally, having determined that application of Pataskala Oaks' one-year policy violates R.C. 4112.01(B) and R.C. 4112.02(A) as it pertains to pregnant women, it is **ORDERED** that Pataskala Oaks revise its one-year policy so that it is in accordance with this Final Order.

This ORDER issued by the Commission on this 1st day of March, 2007.



JEANINE DONALDSON, Chairperson



PASTOR AARON WHEELER, SR, Commissioner

ALTAGRACIA RAMOS, Commissioner



LEONARD HUBERT, Commissioner

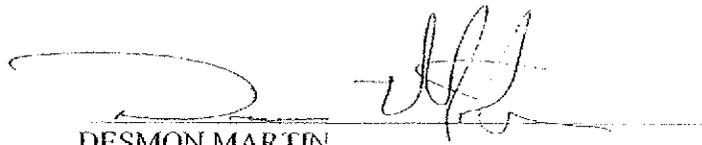
RASHMI YAJNIK, Commissioner

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Chief of Compliance, of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Final Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.



DESMON MARTIN
CHIEF OF COMPLIANCE
OHIO CIVIL RIGHTS COMMISSION

DATE: 3/1/07

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Tiffany R. McFee

Complainant

v.

Complaint No. 9816

(COL) 71020404 (30932) 030204

22A - A4 - 01414

**Nursing Care Management of
America, Inc. d/b/a Pataskala
Oaks Care Center**

Respondent

ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

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Complainant

INTRODUCTION AND PROCEDURAL HISTORY

Tiffany R. McFee (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2004.

The Commission investigated the charge and found probable cause that Nursing Care Management of America, Inc. d/b/a Pataskala Oaks Care Center (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on January 13, 2005.

The Complaint alleged that Respondent discharged Complainant for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

Respondent filed an Answer to the Complaint on February 10, 2005. Respondent admitted certain procedural allegations, but denied

that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The Commission and Respondent moved the Administrative Law Judge (ALJ) to waive the public hearing in this matter in lieu of their submission of a Joint Stipulation of Facts. The Motion was granted; the Commission and Respondent submitted the Joint Stipulation of Facts on August 5, 2005.

The record consists of:

- the previously described pleadings;
- the Joint Stipulation of Facts; and
- the post-hearing briefs and the Commission's reply:
 - filed by the Commission on August 8, 2005;
 - filed by Respondent on August 17, 2005; and
 - filed by the Commission on August 24, 2005.

FINDINGS OF FACT

1. Complainant filed a sworn charge affidavit with the Commission on March 2, 2004.

2. The Commission determined on December 16, 2004 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. Respondent is a corporation duly qualified to conduct business in the State of Ohio. It maintains an office and place of business in Franklin County, Ohio.

4. Respondent is an "employer" as defined by R.C. 4112.01(A)(2).

5. Prior to the issuance of Complaint No. 9816, the Commission attempted conciliation, which was unsuccessful.

6. Complainant was hired by Respondent as a Licensed Practical Nurse on June 9, 2003.

pregnancy-related swelling. The physician's note stated Complainant could return to her normal duties six weeks following her delivery. (Ex. 1 -- January 6, 2004 physician's note).

11. Complainant gave birth on February 1, 2004.

12. Complainant was officially terminated on February 4, 2004.

13. Complainant was terminated because she did not qualify for the leave provided in Respondent's policy, since at the time of her request for leave she had been employed for less than one year.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.¹

1. The Commission alleged in the Complaint that Respondent discharged Complainant for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

¹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. This allegation, if proven, would constitute a violation of R.C.

4112.02, which provides in pertinent part that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the ... sex, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The term “because of sex” includes because of sex on the basis of pregnancy. R.C. 4112.02(B) provides that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, ... *as other persons not so affected but similar in their ability or inability to work*

(Emphasis added.)

4. Ohio Administrative Code (O.A.C.) 4112-5-05(G)(5) provides that:

Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer’s leave policy *the female employee would qualify for leave*, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. *For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing* (Emphasis added.)

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGloric* (1998), 82 Ohio St.3d 569. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads “almost verbatim to the Pregnancy Discrimination Act” of 1978 (PDA). *Priest v. TFH-EB, Inc. d/b/a Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; See 42 U.S.C. § 2000e(k). Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the PDA.

6. The Commission’s allegations of pregnancy discrimination are not based on direct evidence of pregnancy-based discriminatory animus. Therefore, the claims raised are properly analyzed under the evidentiary framework established in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *McDonald Douglas v. Green*, 411 U.S. 792, 802 03, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973).

7. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969, n.13. In this case, the

Commission may establish a *prima facie* case of sex discrimination by proving that:

- (1) Complainant was pregnant;
- (2) Complainant was qualified for her position;
- (3) Respondent subjected Complainant to an adverse employment action; and
- (4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

Ensley-Gaines v. Runyon, 72 FEP Cases 602 (6th Cir. 1996).

8. The *Ensley Gaines* case is distinguishable from the case at bar because it does not involve a set a facts where the employee was terminated due to a policy that requires employees to qualify for leave based on length of service.

9. Another case cited by the Commission, *McConaughy v. Boswell Oil Co.*, 126 Ohio App. 3d 820, is factually distinguishable because the discharged employee was granted leave but she was terminated after twelve weeks. In that case a non-pregnant employee who was similarly unable to return to work for an extended period of time was not terminated.

10. The Commission has not introduced evidence of employees who were treated better than Complainant that were “similar in their ability or inability to work”.

11. Based on the Commission’s interpretation of R.C. 411202(A), O.A.C. 4112-5-05(G)(5) authorizes a length of service requirement for leave time, as long as it is applied equally.²

12. Ohio law does not require that pregnant employees be given preferential treatment. *Priest, supra*, at 1074.

Ohio courts implicitly ... and expressly recognize that an employer need not accommodate pregnant women to the extent that such accommodation amounts to preferential treatment. (Citations omitted).

See also Davidson v. Franciscan Health System of the Ohio Valley, Inc., 82 F. Supp. 2d 768, 774 (S.D. Ohio 2000) (“The case law and the statute are clear – the PDA does not require that employers treat pregnant employees more favorably.”) (Citations omitted); *Dormeyer v. Comerica Bank of Illinois*, 223 F. 3d 579, 583 (7th Cir. 2000) (PDA does not protect

² A one-year length of service requirement violates Title VII, according to the Equal Employment Opportunity Commission (EEOC). However, in that case the collective bargaining agreement provided that males and females could take leaves of absence for other reasons before they acquired one year of seniority. Thus, pregnant employees were singled out for adverse treatment. *See EEOC Decision 72 1919*, (June 6, 1972), 4 FEP Cases 1163.

a pregnant employee from being discharged for absenteeism, even if the absences are due to complications of pregnancy, unless absences of non-pregnant employees are overlooked).

13. In conclusion, based on the Commission's regulations and the lack of evidence to show that similarly situated employees were similar in their ability or inability to work, the Commission failed to establish a *prima facie* case of pregnancy discrimination.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9816.

A handwritten signature in cursive script, appearing to read "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 19, 2006